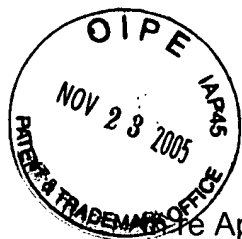


Customer Number 22,852  
Attorney Docket No. 05725.0903-00000



Application of:

Confirmation No.: 5364

Group Art Unit: 1617

Examiner: G. Yu

Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

## PRE-APPEAL BRIEF REQUEST FOR REVIEW

In response to the Final Office Action dated March 3, 2005, the period for response having been extended to November 24, 2005, by a petition for extension of time and fee payment filed concurrently herewith, Applicants respectfully request reconsideration of this application in view of the following remarks. A Notice of Appeal is filed concurrently herewith.

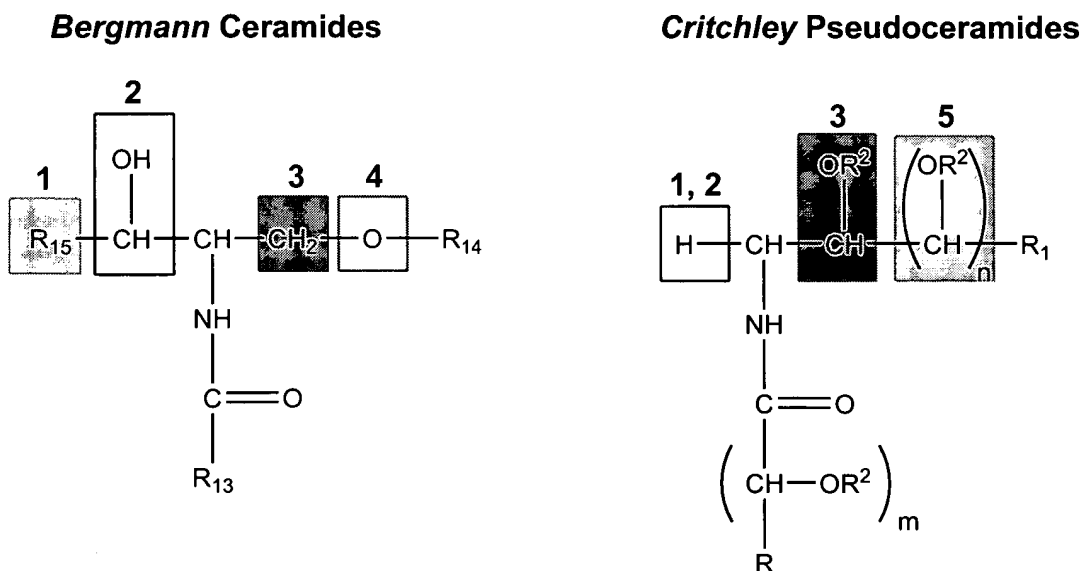
Claims 19-82 are pending in the application. All claims have been rejected.

**I. Rejections Under 35 U.S.C. § 103(a)**

**A. Bergmann in view of Critchley**

The Examiner has rejected claims 19, 20, 27-33, 52-54, 56-58, 61, 64-66, 69, 72-76, 79, and 82 under 35 U.S.C. § 103(a) as being obvious over *Bergmann* (U.S. Patent No. 6,110,450) ("*Bergmann*") in view of *Critchley et al.* (U.S. Patent No. 5,198,210) ("*Critchley*"). Office Action, pages 2-3. Applicants submit that the Examiner's rationale for making this combination is in error.

The Examiner alleges that "*Critchley* teaches the use of isocetyl alcohol with ceramides." Office Action, page 3. Applicants respectfully note that *Critchley* does not teach the use of ceramides at all. Rather, *Critchley* teaches the use of pseudoceramides, which are chemically distinct from ceramides. The chemical structure of the pseudoceramides taught by *Critchley* is contrasted below with the chemical structure of the ceramides taught by *Bergmann*. Key differences in the chemical structures are highlighted in the figure.



There are at least five key differences between the ceramides taught by *Bergmann* and the pseudoceramides taught by *Critchley*. These differences are labeled in the figure above. The ceramides taught by *Bergmann* contain four unique chemical groups relative to the pseudoceramides taught by *Critchley*: (1) R<sub>15</sub>, a C15-C26 hydrocarbon radical, (2) a hydroxyl-substituted methine group, (3) a methylene group, and (4) an ether. The pseudoceramides taught by *Critchley* contain three unique chemical groups relative to the ceramides taught by *Bergmann*: (1,2) a hydrogen radical, (3) a hydroxyl-, sugar-, sulfate-, or phosphate-substituted methine group, and (5) an optional hydroxyl-, sugar-, sulfate-, or phosphate-substituted methine group. Given these numerous differences, one of ordinary skill in the art would expect the ceramides taught by *Bergmann* and the pseudoceramides taught by *Critchley* to have distinct chemical, physical, and cosmetic properties. As *Critchley* does not teach ceramides, Applicants respectfully submit that *Critchley* cannot teach the use of isocetyl alcohol with ceramides.

The Examiner further alleges that "Critchley teaches the equivalence of isocetyl alcohol with those fatty alcohols used in Bergmann." *Id.*, page 3. To combine the teachings of *Bergmann* and *Critchley* would require selecting certain ingredients from each to create the presently claimed invention. *Critchley* provides fifty-seven examples of emollients that may be used as cosmetically acceptable vehicles. The emollients recited by *Critchley* are chemically diverse, including vegetable oils such as avocado oil; animal fats such as tallow; petroleum products such as petroleum jelly; silicone oils; polymers such as polyethylene glycol; esters such as butyl stearate; solid fatty alcohols such as cetyl alcohol and stearyl alcohol; and the liquid fatty alcohol isocetyl alcohol. The broad conclusory statement regarding the alleged equivalence between isocetyl

alcohol and other fatty alcohols relates only to the use of these fatty alcohols as a "cosmetically acceptable vehicle to act as a dilutant, dispersant, or carrier" in combination with pseudoceramides. *Critchley*, column 10, lines 26-27. Applicants believe *Critchley* is silent as to any other similarities between these fifty-seven disparate emollients.

Based on this lack of guidance, were a skilled artisan to attempt to select an emollient "equivalent" to a cetyl alcohol or stearyl alcohol, both solid fatty alcohols, from *Critchley*'s list of fifty-seven emollients, it is unlikely that that skilled artisan would seek to replace a solid compound with a liquid compound, absent the teachings of the presently claimed invention. Thus, the combination of *Bergmann* in view of *Critchley* would fail to render obvious the claimed invention for this additional reason.

Applicants further note that independent claims 19 and 82 are drawn to liquid compositions, which are defined in the specification as compositions having a viscosity less than 1 Pa.s (1,000 cpoises or 1,000 mPa.s). Specification, page 3, lines 13-18. To establish a prima facie case of obviousness, a combination of prior art references must teach or suggest all the claim elements. *Bergmann* and *Critchley* neither teach nor suggest a liquid cosmetic composition. In fact, *Bergmann* teaches a shampoo having a viscosity between 4,000 and 7,000 cps (*Bergmann*, column 8, lines 42-43), and *Critchley* explicitly excludes liquid compositions. The compositions taught by *Critchley* "can be formulated as a lotion having a viscosity of from 4,000 to 10,000 mPas, a fluid cream having a viscosity of from 10,000 to 20,000 mPas or a cream having a viscosity of from 20,000 to 100,000 mPas, or above." *Critchley*, column 17, lines 21-26. Therefore, the combination of *Bergmann* and *Critchley* does not teach or suggest a liquid composition as claimed in claims 19 and 82.

In view of the above argumentation, Applicants respectfully submit that the Examiner has failed to set forth a prima facie case of obviousness. Applicants respectfully request reconsideration and withdrawal of the rejection.

*B. Bergmann in view of Critchley and Maubru, Dubief, and/or Ochia*

The Examiner has rejected claims 21-26, 34-51, 55, 59, 60, 62, 63, 67, 68, 70, 71, 77, 78, 80, and 81 under 35 U.S.C. § 103(a) as being obvious over *Bergmann* in view of *Critchley*, as applied to claims 19, 20, 27-33, 52-54, 56-58, 61, 64-66, 69, 72-76, 79, and 82 as above, and further in view of *Maubru et al.* (U.S. Patent No. 6,312,674 B1) ("*Maubru*"), *Dubief et al.* (U.S. Patent No. 6,120,757) ("*Dubief*") and/or *Ochiai et al.* (U.S. Patent No. 5,587,155) ("*Ochiai*") in three separate rejections. Office Action, pages 3-7. Applicants submit that the Examiner has failed to set forth a prima facie case of obviousness in each rejection at least for the reason that none of the tertiary references make up for the deficiencies in the combination of *Bergmann* and *Critchley* highlighted above.

**II. CONCLUSION**

In view of the foregoing remarks, Applicants respectfully request reconsideration of this application and the timely allowance of the pending claims. If there is any fee due in connection with the filing of this paper, please charge the fee to our Deposit Account No. 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,  
GARRETT & DUNNER, L.L.P.

Date: November 23, 2005

By:



Mark D. Sweet  
Reg. No. 41,469